STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-430-S
v.	)	PERB Decision No. 1365-S
STATE OF CALIFORNIA (EMPLOYMENT DEVELOPMENT DEPARTMENT),	)	December 17, 1999
Respondent.	)	

Appearances: Michael D. Hersh, Attorney, for California State Employees Association; State of California (Department of Personnel Administration) by Linda M. Nelson, Labor Relations Counsel, for State of California (Employment Development Department).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to a proposed decision by a PERB administrative law judge (ALJ) filed by the State of California (Employment Development Department) (EDD or State). The ALJ found that the State violated section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act)[1] by

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of

interfering with the exercise of protected rights and discriminating against an employee, Alan Constantino (Constantino), for his participation in protected activities, thereby denying the California State Employees Association (CSEA) its right to represent bargaining unit members.

The Board has reviewed the entire record in this case, including the ALJ's proposed decision, the transcripts and exhibits, and the filings of the parties. The Board hereby reverses the proposed decision and dismisses the unfair practice charge and complaint in accordance with the following decision.

BACKGROUND

CSEA is the exclusive representative of employees in nine state bargaining units including Units 1, 4 and 15, and the State is the employer within the meaning of the Dills Act.

EDD's former Long Beach office on Pine Street housed approximately 70 employees including 10 managers. The work stations for the 60 rank and file employees located at the office were contained in one large area which was not accessible to the public, nor did the public have visual access to the employees' work area.

The practice at the Pine Street office was for employees to take a 15-minute break in the morning and another in the afternoon. Employees took their morning breaks at various times

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this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

between 10:00 a.m. and 11:00 a.m.. Upon being hired, employees signed up for a particular break time; however, a strict schedule was not normally followed and break times were flexible for most employees. Certain assignments required pre-scheduled arrangements for break time so that telephone coverage would be maintained.

Employee activities during break times varied. Some employees stayed at their desks while others went to the break room or went outside the building. A few employees at times engaged in stretching movements at their desks during their breaks.

On October 8, 1997, employees participated in a CSEA-promoted "unity break" which, according to Constantino, was planned at meetings in September at which CSEA decided to conduct certain worksite activities. The purpose of the planned activities was to publicize concerns with the status of negotiations over new collective bargaining agreements, and demonstrate solidarity to employees and management. The unity break conducted at the Long Beach EDD office was one such activity. It was planned that during the unity break at the EDD office, employees would stand for one minute and hold up a sign inscribed with a negotiating slogan. The sign was a yellow poster 18 by 24 inches stating "Raises, Rights, Respect, for State Workers" in bright red print. There was no planned chanting or other verbal activity.

The testimony of the witnesses varies as to the time the unity break actually occurred. Constantino said it began at approximately 10:00 a.m. while Kevin Haygood (Haygood), the EDD office manager, testified that it occurred at approximately 11:00 a.m. According to Constantino and other witnesses, approximately 30 employees, half of those whose work stations were located in the large area within the Long Beach office, participated in the unity break.

While similar activities may have been planned to occur at other offices, the record contains no evidence concerning those activities. There is no evidence that similar activities occurred at other locations in work areas such as the large area within the Long Beach EDD office.

When the unity break was noticed by EDD managers, program manager Maurice Presley (Presley) left a management meeting to talk to Constantino, who Presley believed was leading the demonstration. Presley and Constantino left the work area and were in conference for five or ten minutes. When they completed their conference and returned to the work area, approximately 10 employees were still standing with their signs. First Presley and then Constantino told the employees that the demonstration was over and the unity break ended. Some employees then returned to work while others continued their break in the break room or elsewhere.

On October 9, 1997, Haygood gave Constantino a memorandum which stated:

> On October 8, 1997, at approximately 11:00 a.m., I became aware of some employees raising signs calling for a raise. Some employees sat at their desks, others stood with signs, while others including yourself were walking around holding up signs. Maurice Presley spoke to you and asked what was going on. You advise [sic] that the staff was participating in a "Unity Break." Maurice also asked you if you had let me know about this action. You replied "no" and apologized.
>
> This activity caused staff to stop working for up to five minutes. I called our Labor Relations office and spoke to Phyllis Moore. She advised me that this type of organizational union activity was not to be held inside state property, nor during state work time. This type of activity can be conducted, but must be done outside and during employee's own time.
>
> During a meeting with you, Maurice Presley, Program Manager; [sic] and Allan Steward, Program Supervisor, you indicated this was a planned activity and that there was going to be another action on October 22, 1997. Please be advised, you may not have an action such as a unity break during state time or inside the building. You indicated that the action planned for October 22, 1997, would involve an outside unity break during lunch time.
>
> Ms. Moore advised me to put this in writing to you. Any further activity conducted inside the office and/or on state time may be subject to Disciplinary Action.

According to EDD, the memo did not go into Constantino's official personnel file, but it was kept in his informal file at the EDD field office.

On October 20, 1997, CSEA filed the instant unfair practice charge. The PERB Office of the General Counsel issued a complaint on January 14, 1998, alleging that Constantino

exercised rights guaranteed by the Dills Act by organizing and engaging in the unity break and that the State took adverse action against Constantino because of his protected activity and interfered with employee rights to engage in protected conduct, thereby violating Dills Act section 3519(a). This same conduct was alleged to deny CSEA its right to represent unit members in violation of Dills Act section 3519(b).

DISCUSSION

Dills Act section 3515 gives state employees:

> . . . the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

This case involves allegations of interference with this protected right, and discrimination against Constantino for his exercise of that right.

To establish unlawful interference, the charging party must show that the employer's conduct tends to or does result in harm to protected employee rights. If the harm is slight and the employer's conduct is justified based on operational necessity, the competing interests of the employer and employee are balanced to resolve the charge. If the harm is inherently destructive of protected employee rights, the employer's conduct is excused only by showing that it resulted from circumstances beyond the employer's control and no alternative course of action was available. (Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad) at pp. 10-11.) While proof of

unlawful employer motivation or actual harm to protected rights is not required in interference cases, in order to establish unlawful discrimination, it must be shown that the employee participated in protected activity of which the employer was aware, and that the employer took adverse action against the employee which was motivated by that participation. (Novato Unified School District (1982) PERB Decision No. 210.)

The parties dispute whether the unity break which occurred at the Long Beach EDD office constituted Dills Act protected activity. The specific conduct involved an organized activity during which employees displayed signs relating to CSEA's contract negotiations with the State at their work stations during their break period.

Employees have the right to communicate with each other at the worksite about their terms and conditions of employment. (Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99 (Richmond).) In Richmond, the Board adopted the United States Supreme Court ruling in Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620] (Republic Aviation Corp.). In that ruling, the Supreme Court stated:

> . . . time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be

> an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. Id., 324 U.S. at 803, n. 10, quoting Peyton Packing Company (1943) 49 NLRB 828, 843-844 [12 LRRM 183].

The Board affirmed employees' rights to solicit union membership and distribute union materials at the worksite in Marin Community College District (1980) PERB Decision No. 145 and Long Beach Unified School District (1980) PERB Decision No. 130. And in Rio Hondo Community College District (1982) PERB Decision No. 260, the Board cited NLRB v. Thor Power Tool Co. (1965) 351 F.2d 584 [60 LRRM 2237] at p. 585 for the principle that employees engaged in protected conduct must be given some leeway for impulsive behavior which must be balanced against the employer's right to maintain order.

But there is a critical factual difference between all of these cases and the instant case which readily distinguishes it. In this case, the disputed activity occurred in the large work station area within the Long Beach EDD office which housed approximately 60 employees, and while the employees who participated in the unity break did so during their break period, approximately 30 other employees at adjacent work stations were on duty at that time. There are no PERB cases which address analogous circumstances. However, cases decided by the National Labor Relations Board (NLRB) offer some guidance in this area.

Interestingly, the excerpt from Peyton Packing Company (1943) 49 NLRB 828, 843-844 [12 LRRM 183], which the Supreme

Court cited in Republic Aviation Corp. also included the following:

> Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours.

In G.H. Bass & Co. and Greg Gerritt (1981) 258 NLRB 140 [108 LRRM 1123] (G.H. Bass), the NLRB considered whether an employee had the protected right to distribute union literature during lunchtime to employees at their work stations. Noting that the parties did not dispute the right to distribute material "in nonworking areas, during nonworking time," the NLRB summarized the issue in this way:

> The dispute turns on whether certain work areas during the lunch break in the circumstances of this case should be treated as nonworking areas for the purposes of distributing literature.

In G.H. Bass, the work setting was a shoe manufacturing plant to which the public had no access. The NLRB found that the work area in question essentially became a lunchroom during the lunch period because all machines were required to be shut down and employees punched out during that period. Therefore, the distribution occurred in a nonwork area during nonwork time and was protected.

In Family Foods (1990) 300 NLRB 649 [136 LRRM 1212], the NLRB found an employer's restriction on employee solicitation of union membership on company time to be lawful, because the restriction was clarified so that it did not apply to periods

when both the employee solicitor and the employee being solicited were not on duty.

From Richmond and the other cited cases, it is clear that employees have the Dills Act protected right to communicate with each other at the worksite concerning their terms and conditions of employment during nonwork time in nonwork areas. Employees must be given leeway in the exercise of this right, which may be restricted by the employer only when it can be demonstrated that it is necessary to maintain order, production or discipline. In circumstances in which employees in a work setting not accessible to the public all take their lunch or break in their work area at the same time, it is considered a nonwork area during that nonwork time.

But the cited cases also lead to the conclusion that activities such as the unity break at issue in this case may be restricted by the employer if they do not occur during nonwork time in nonwork areas. In these circumstances, the employer must be given leeway to restrict those activities in order to maintain order, production or discipline. This would include situations in which the employees conducting the activities are on nonwork time, but the activities occur in a work area during a period in which other employees are working.

Returning to the facts of this case, when Constantino and 30 other employees conducted the unity break during their morning break in the Long Beach EDD office, they did so in a work area in which approximately 30 other employees were at their work

stations on duty and not on break. Therefore, the unity break activity did not occur during nonwork time in a nonwork area and EDD must be allowed to restrict the activity in order to maintain order and production.

Under Carlsbad, an allegation of unlawful interference must demonstrate that the employer's conduct harmed or tended to harm protected rights. Since EDD's restriction on the unity break activity was not improper, CSEA has failed to show that the State's action harmed or tended to harm rights protected by the Dills Act. In reaching this conclusion, the Board notes that the October 9 memorandum Haygood gave to Constantino advised him that unity break activity could be conducted during employee nonduty time provided it did not occur inside the office. While the record contains no evidence with regard to the application of this policy, it appears to indicate that the activity could occur in nonwork areas during nonwork time consistent with the cases cited above.

The allegation that the State interfered with Dills Act protected rights by restricting the unity break activity which occurred within the work area of the EDD Long Beach office on October 8, 1997, is dismissed.

Consistent with this conclusion, the Board also finds that the State did not unlawfully retaliate against Constantino for his exercise of protected activity when it gave him the October 9 memorandum advising him of the restrictions on unity break activity. Therefore, that allegation is also dismissed.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-430-S are DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.